SINGAPORE REPORTS

Ling Kai Seng & Anor v Outram Realty Pte Ltd

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 910 OF 1988
GOH JOON SENG J
23 MAY 1991

Land Law — Sale and purchase of land — Shortfall in area of shop unit — Whether purchaser's claim time-barred — Whether purchaser had waived their right to compensation

Contract — Breach — Anticipatory breach — Claim for compensation for shortfall in area of unit — When cause of action accrued — Purchaser completed the purchase — Whether purchaser had thereby waived their right to compensation

Limitation — Anticipatory breach of sale and purchase agreement — When limitation begins to run —Limitation Act (Cap 163, 1985 Ed), s 6

On 26 September 1978, the plaintiffs entered into a sale and purchase agreement ('the agreement') for the purchase from the defendants of a shop unit in a building then under construction. The agreement incorporated The (Revised) Singapore Conditions of Sale 1948. The shop unit sold was described in the agreement as having an approximate floor area of 458sq ft but the actual floor area of the completed unit was 17.9% less than this. The plaintiffs sued the defendants for damages. The defendants claimed that the plaintiffs' claim was time-barred (with the time being assessed from the date that the plaintiffs had notice of the shortfall in floor area) and that the plaintiffs had waived their claim by completing the agreement.

Held, allowing the plaintiffs' claim:

(1) The delivery of the duplicate subsidiary strata certificate of title ('COT') to the plaintiffs' solicitors would have given the plaintiffs notice that the defendants would not give them title to the unit with the contractual floor area. The plaintiffs could then decide to accept the renunciation and treat it as discharging them for further performance and sue for damages, or they might wait until actual completion and then sue.

(2) Since the plaintiffs completed the sale, the time for limitation started not from the date of delivery of the COT but from the date of completion. Hence, the plaintiffs' action was not statute-barred.

(3) Condition 11 of the agreement gave the plaintiffs, in the event of a substantial shortfall, the option of either annulling the agreement or completing the purchase and suing for the shortfall. Therefore, completion was not consistent only with waiver by the plaintiffs of their claim. It was not a clear and unequivocal representation that would have led the defendants to believe that the plaintiffs would not pursue their claim.

Cases referred to

1 *Yeo Brothers Co (Pte) Ltd* v *Atlas Properties (Pte) Ltd* [1988] 1 MLJ 150 (refd)
2 *Chong Ah Kwee & Anor* v *Viva Realty Pte Ltd* [1990] 2 MLJ 389 (refd)
3 *Kammins Ballrooms Co Ltd* v *Zenith Investments (Torquay) Ltd* [1970] 2 All ER 871 (refd)
4 *Production Technology Consultants Ltd* v *Barlett* [1988] 25 EG 121 (follld)

Legislation referred to

Limitation Act (Cap 163, 1985 Ed) s 6

Aw Ee Tuan for the plaintiffs.
Susan Tay for the defendants.

Cur Adv Vult

Goh Joon Seng J: The defendants were at all material times the developers of the building known as Pearls Centre, at 100, Eu Tong Sen Street, Singapore.

On 26 September 1978, the plaintiffs entered into an agreement ('the sale and purchase agreement') with the defendants for the purchase from the defendants of a shop unit No G31 on the ground floor of the said building then under construction at the price of $160,000.

Clause 1 of the sale and purchase agreement reads:

> The vendor shall sell and the purchaser shall purchase free from encumbrances all the residue of the leasehold estate of a term of 99 years commencing from 15 October 1969 in part of the land comprising the shop described in the First Schedule hereto (hereinafter referred to as 'the housing/shop unit') to be comprised in a subsidiary strata certificate of title under the provisions of the Land Titles (Strata) Act (Cap 277) being one of the strata units in the building now being erected or erected by the vendor upon the land described in the First Schedule hereto and known as Pearls Centre (hereinafter known as 'the building project') subject to the following conditions of sale by public auction known as 'The (Revised) Singapore Conditions of Sale' as far as the same are applicable to a sale by private treaty and are not varied by or inconsistent with the special conditions herein.

The sale and purchase agreement thus incorporates The (Revised) Singapore Conditions of Sale 1948, condition 11 of which reads:

> The property is believed and shall be taken to be correctly described as to quantity and otherwise and is sold subject to all chief, quit and other rents and outgoings and to all incidents of tenure, rights of way, and other rights and easements (if any) affecting the same and if any error, misstatement or omission (not of a serious or vital nature nor considerably affecting the value of the property) shall be discovered in the particulars special conditions or contract the same shall not annul the sale nor shall any compensation be allowed by or to either party in respect thereof.

The shop unit is described in the First Schedule as follows:

> All that shop on the ground floor of the building known as Pearls Centre now being erected or erected on part of the land in the District of _____ in the Republic of Singapore estimated to contain a floor area of approximately 458sq ft being part of the Government Resurvey Lot 178

of TS XXII forming part of the land comprised in Grant No/Lease No _____ which said shop unit is provisionally known as Shop No G31 (formerly known as G30) Ground Floor, Singapore.

On 11 February 1981, the defendants through their solicitors, served on the plaintiffs notice to complete the purchase forwarding therewith, inter alia, the duplicate subsidiary strata certificate of title. The floor area of the unit shown in the said duplicate subsidiary strata certificate of title is 35sq m that is 376sq ft. There is therefore a shortfall of 82sq ft or 17.9% in the actual floor area as against the area stated in the First Schedule to the sale and purchase agreement.

Completion by way of the handing over of the transfer took place on 26 October 1982. The transfer instrument being 1/26969C was registered on 11 February 1983.

The proceedings herein were filed on 14 September 1988 seeking damages for breach of the sale and purchase agreement amounting to $28,645.88 or alternatively damages to be assessed by the court and interest.

In *Yeo Brothers Co (Pte) Ltd* v *Atlas Properties (Pte) Ltd*,[1] Justice Lai Kew Chai held that a shortfall in the floor area of a flat by 10.77% is a substantial misdescription under condition 11 of the Singapore Law Society Conditions of Sale 1981 which condition is identical to condition 11 of The (Revised) Singapore Conditions of Sale.

In *Chong Ah Kwee & Anor* v *Viva Realty Pte Ltd*,[2] Justice Chan Sek Keong held that a shortfall of 16.47% in the floor area of a flat is both of a serious nature and that it considerably affects the value of the property under condition 11 thereby entitling the purchaser to compensation by way of proportionate abatement of the purchase price.

In the light of these decisions the defendants, at the hearing before me, chose to rely only on the defence of limitation and waiver.

I shall now deal with the issue of limitation.

By cl 1 of the sale and purchase agreement read with the First Schedule, the defendants agreed to sell to the plaintiffs the unit estimated to contain a floor area of approximately 458sq ft. The unit assigned on completion contains a floor area of only 376sq ft. This constituted a breach of the sale and purchase agreement by the defendants. The issue is: when did the cause of action for the breach arise? The defendants contend that the cause of action arose when the plaintiffs first became aware or ought to have been aware of the shortfall. This was on 11 February 1981 when the duplicate subsidiary strata certificate of title showing the actual floor area was forwarded to the plaintiffs' solicitors. Therefore the claim became statute-barred by 11 February 1987 by virtue of s 6 of the Limitation Act (Cap 163, 1985 Ed).

The delivery by the defendants' solicitors of the duplicate subsidiary strata certificate of title on 11 February 1981 to the plaintiffs' solicitors with a request to complete the purchase would have given the plaintiffs notice that the defendants would not give them title to the unit with a floor area of 458sq ft on completion. This constituted an anticipatory breach of the sale and purchase agreement by the defendants. The plaintiffs could thereupon elect to take one of the two courses open to them. They could accept the 'renunciation', treat it as discharging them from further performance and sue for damages or they might wait till actual completion and then sue.

> If before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part, this constitutes an 'anticipatory breach' of the contract and entitles the other party to take one of two courses. He may 'accept' the renunciation, treat it as discharging him from further performance and sue for damages forthwith, or he may wait till the time for performance arrives and then sue.
> *Chitty on Contract* (26th Ed) Vol 1 para 1713.

The plaintiffs did not annul the sale and purchase agreement pursuant to condition 11 but waited till the time came for completion, completed the purchase and subsequently sued for damages.

> The general rule in contract is that the cause of action accrues, not when the damage is suffered, but when the breach takes place. In an action for aasumpsit, the statute of limitations begins to run not from the time when the damage results from breach of the promise, but the time when the breach of promise takes place. The gist of an action for breach of contract is the breach, and not any resulting damage which may be occasioned thereby. Consequently, the Act runs from the time when the contract is broken ...
> *Chitty on Contract* (26th Ed) Vol 1 para 1931.

I therefore reject the defendants' contention that the plaintiffs' claim became statute-barred by 11 February 1987. I hold that time herein ran from the date of completion which was on 26 October 1982 and hence the claim was not statute-barred when these proceedings were filed on 14 September 1988.

But since on completion, the plaintiffs did not reserve their claim for the shortfall, the defendants contend that the plaintiffs have waived their rights in respect of the same.

> ... where there is no contractual term that provides for the payment of compensation, the equitable right to abatement or compensation is merely ancillary to relief by way of specific performance. If the parties have proceeded to completion and have not expressly or impliedly reserved rights to compensation or an abatement, the basis for relief is ordinarily regarded as at an end. Conversely, compensa-

tion may be recoverable after completion if there has been no merger or waiver and if it has not become inappropriate that equitable relief should be granted.

When, however, compensation is claimed pursuant to a compensation clause, it is in the first place a question of the construction of the material clause whether compensation may be obtained after completion. It is sometimes found as a matter of construction that the parties have not intended that the right to compensation should be limited to compensation that is claimed or recovered before completion. Then, in the second place, it is necessary to establish whether a right to compensation that is not so limited nonetheless has been brought to an end through a subsequent act of the parties. So in the case of rights that are capable of being asserted after completion it may be found that an act by or on behalf of the purchaser has given rise to a waiver or that the parties have expressly or impliedly agreed that subsisting rights are to be merged or given up. *However, it is commonly found in ascertaining the intention of the parties that the taking of possession, the payment of the price, and even the execution of documents of conveyance have not been such as to bring about a merger or loss of a right to compensation that is founded on a special contractual provision.* (Emphasis is mine.) *Spry's Equitable Remedies* (1990) at p 303.

The plaintiffs' claim herein is based on condition 11 which is the special contractual provision for compensation. Under this condition, faced with such a substantial shortfall the plaintiffs' remedies were either to annul the sale and purchase agreement or complete their purchase *and* sue for the shortfall.

Therefore completion was not consistent only with waiver by the plaintiffs of their claim for the shortfall. As such no waiver should be implied. Per Lord Diplock in *Kammins Ballrooms Co Ltd* v *Zenith Investments (Torquay) Ltd*[3] at p 894:

'Waiver' is a word which is sometimes used loosely to describe a number of different legal grounds on which a person may be debarred from asserting a substantive right which he once possessed or from raising a particular defence to a claim against him which would otherwise be available to him. We are not concerned in the instant appeal with the first type of waiver. This arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did.

As completion was not an act consistent only with the plaintiffs abandoning their claim for the shortfall, it was not a clear and unequivocal representation that would have led the defendants to believe that the plaintiffs would not pursue their claim for the same.

Both waiver and estoppel would appear to require that the party seeking to rely on it (ie the party in default) must show a clear and unequivocal representation, by words or conduct, by the other party that he will not exercise his strict legal right ... and that he has himself acted in reliance on that representation, if not to his detriment at least in a manner which would render it inequitable for the other party now to exercise that right. ... *Chitty on Contract* (26th Ed) Vol 1 para 1704.

In *Production Technology Consultants Ltd* v *Barlett*,[4] the plaintiff bought at an auction attended by its representative, one Behcet, a freehold house for investment. It was divided into four flats on different floors. According to the particulars the top floor was leased for a term of 99 years from 25 September 1979 at a rent of £40 a year. The first floor was let to a Mr Buttle at £2.55 per week. The ground floor was leased for a term of 99 years from 25 March 1976 at a rent of £30 per year, and the semi-basement was let at a weekly rent of £5. These particulars were misleading and inaccurate, in that the first floor was also subject to a separate lease for a term of 99 years from 25 September 1979 at a rent of £40 per year. Behcet formed the view that Buttle was unlikely to remain tenant of the first floor for long and bid successfully for the property on behalf of the plaintiff. The conditions of sale provided that the property was sold subject to the entries in the charges register of title. It also provided that a copy of the register might be inspected at the office of the auctioneers during office hours prior to the auction. Behcet did not avail himself of this facility but relied on the particulars. The office copy entries would have disclosed the existence of the 99-year lease in respect of the first floor. Behcet would not have bid for the property or would only have bid at a lower price if he had known of this 99-year lease of the first floor. After the auction the defendant vendor's solicitors supplied copies of the three 99-year leases including that of the first floor to the plaintiff's solicitors. But it appears that neither the plaintiff's solicitors nor that of the defendant fully appreciated the effect of the 99-year lease of the first floor. The purchase was completed. The plaintiff subsequently sued for damages for misrepresentation. The Court of Appeal unanimously held that the plaintiff was not precluded from claiming damages by the fact that the purchase had been completed. Per Dillon LJ at p 122:

We were referred also to the decision of this court in *Gordon* v *Selico Co Ltd* [1986] 1 EG 71. In giving the judgment of the court in that case, Slade LJ said at p 77:

'Even if at the date of completion the plaintiffs had been fully aware of the fraudulent misrepresentation which had been made to them, this would not have precluded them from affirming the contract and seeking appropriate relief, though it would have prevented them from seeking to rescind it.'

The statement of Slade LJ was also obiter, but in my judgment it was, if I may respectfully say so, a correct statement of the law.

Accordingly the plaintiff company is not precluded from claiming damages by the fact that the purchase was completed in the condition of the mutual muddle between the solicitors as to the effect of the 99-year lease ...

I therefore hold that the plaintiffs did not waive their claim for the shortfall. Neither was there merger in view of the provisions of cl 21 of the sale and purchase agreement which reads:

> Notwithstanding completion of the sale and purchase herein the terms and conditions of this agreement shall remain in full force and effect as between the vendor and the purchaser in so far as the same are not fulfilled.

On compensation for the shortfall, the unit was sold for $160,000 with an estimated area of 458 sq ft. This works out at $349.35psf. I therefore allow abatement in the purchase price at $349.35psf of the shortfall. Judgment is accordingly given in favour of the plaintiffs with costs.

The defendants raise the possibility of the shortfall being due to the demolition by the plaintiffs of the partitioning wall between G31 and G29. In that event there would be a corresponding increase in the floor area of G29 which also belongs to the plaintiffs. I discount this possibility but nonetheless I add a rider to the effect that in working out the amount to be abated, the excess, if any, in the actual floor area of unit G29 over the floor area stated in the sale and purchase agreement for unit G29 should be taken into account and the shortfall in G31 offset against the corresponding excess if any in G29.

Application allowed.

Solicitors: *Shook Lin & Bok; Ong Tay & Partners.*

Reported by *Terence Tan Bian Chye*

Chai Chung Ching Chester & Ors v Diversey (Far East) Pte Ltd

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 86 OF 1991
GOH PHAI CHENG JC
29 APRIL 1991

Civil Procedure — Bill of costs — Taxation of — Construction of settlement agreement and consent order — Admissibility of extrinsic evidence — Whether professional fees paid part of damages or cost — Evidence Act (Cap 5, 1970 Ed), ss 93 & 94

Words and Phrases — 'Claims in the suit'

Diversey (Far East) Pte Ltd ('Diversey') in Suit No 5626 of 1986 sued the plaintiffs for an injunction to prevent them from using or divulging Diversey's trade secrets or dealing with Diversey's trade suppliers and for damages for conspiracy to defraud. The dispute was settled prior to the trial in a settlement agreement dated 8 September 1989 ('the agreement'). Under the agreement, the plaintiffs agreed to pay the sum of $400,000 to Diversey in consideration of Diversey releasing them from 'all claims, demands and liabilities of whatsoever nature and whensoever arising or incurred up to and inclusive of the date (of the agreement) including but not limited to the claim in the suit'. A consent order recorded most of the contents of the agreement made.

Both under the agreement and the order of court, Diversey was entitled to taxed costs on a party and party basis. When Diversey presented its bill of costs for taxation, the plaintiffs objected to the inclusion of two items therein, viz the sums of $60,024 and $57,136.44 being professional fees paid to Coopers & Lybrand and to Commercial Trademark Services (Far East) Pte Ltd and Lionel Security Services Pte Ltd, respectively. An application to determine the construction and ambit of the agreement and consent order was, pursuant to the direction of the assistant registrar, taken by the plaintiffs. The issue before the court was whether on a true construction of the agreement, Diversey was not entitled to claim as costs of their action, the professional fees paid. The plaintiffs argued that the agreement was clear and unambiguous and as Diversey had in its statement of claim pleaded the professional fees as a head of loss and damages, Diversey's claim for these two items had been subsumed as part of Diversey's overall claim for damages in the action, although these items could normally have been allowed as costs.

Diversey, on the other hand, argued that the agreement was ambiguous and extrinsic evidence on the circumstances leading up to the agreement should be referred to. In the alternative, Diversey argued that the court should apply either the 'purposive' test or the 'officious bystander test' or the contra proferentum rule. If the court disagreed that the agreement was ambiguous, Diversey argued that there was a mutual mistake and the court should accordingly rectify the agreement. Diversey also argued that its claim for professional costs paid was allowable as costs under the consent order and, until it was set aside, Diversey was entitled to enforce it by having its bill of costs taxed in the usual way.

Held, allowing the plaintiffs' application:

(1) The agreement was clear and unambiguous and accordingly the court cannot refer to extrinsic evidence in its construction of the agreement. The court need not adopt either the 'purposive' test or the test of 'an officious bystander' or the contra proferentum rule.